REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 164 OF 2018

BETWEEN

FELIX NYAKAGWA MUGIRA.....1ST APPELLANT

PAUL KIBERA..... 2ND APPELLANT

AND

JAMES NDOTONO NG'ANG'A..... RESPONDENT

(Being an appeal from the judgment of Senior Resident Magistrate M/s Njalale delivered on 13th November, 2018 in Limuru Magistrate's Court Civil Case No. 20 of 2011)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. Being dissatisfied with the entire judgment of the learned trial court as indicated above the appellants filed this appeal on 13th December, 2018 premised on grounds THAT:-

> ***1. The learned Magistrate erred in law and in fact in failing to evaluate the veracity of the alleged damages in light of the evidence adduced.***
>
> ***2. The learned Magistrate erred in law and fact in failing to find that only a sum of Kshs 138,000/= was proven.***
>
> ***3. The learned Magistrate erred in law and fact in awarding special damages of Kshs 243,600/= without any basis.***

2. It is the appellants' prayer that the appeal be allowed with costs and the decision of the learned Trial Magistrate be set aside and the suit be dismissed with costs.

3. This being the first appellate court it is under an obligation to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. This court has however to remember and make an allowance for the fact that it has no opportunity of seeing and hearing the witnesses who testified during the trial. For this principle see ***Selle & another -vs- Associated Motor Boat Co. Ltd & others [1968] EA 123*** as well as ***Peters -vs- Sunday Post [1958] EA 424.***

Background

4. By the amended plaint dated 5th August, 2015 the respondent herein sued the appellants for recovery of damages in respect of material damage allegedly caused to his motor vehicle registration No. KAC 809A by the 2nd appellant's motor vehicle registration number KBM 608L which was duly insured vide policy No. 590/084/00011/2009/COM. The respondent alleged that the said accident was caused by the negligence of the 1st appellant herein as authorized agent/driver and the 2nd appellant who was the registered owner and insured of the offending motor vehicle. The respondent set out particulars of negligence at paragraph 5 of the amended plaint. He also alleged that as a result of the accident, he suffered loss and damage as follows:-

i. Repair charges - Kshs 243,600/=

ii. Assessment fees - Kshs 4,000/=

iii. Police abstract - Kshs 100/=

iv. Towing charges - Kshs 10,000/=

v. Towing charges - Kshs 6,500/=

Total - Kshs 264,200/=

5. The respondent also pleaded that he suffered personal injuries namely multiple bruises, knee joint and ankle joint, for which he sought to be awarded both general and special damages.

6. The appellants filed their amended statement of defence on 15th May, 2015 in which they denied all particulars of negligence set out by the respondent in his amended plaint. By way of further defence the appellants averred that the subject accident was solely and/or substantially caused by the respondent's own negligence in the manner he drove motor vehicle registration number KAC 809A. The appellants alleged the respondent was negligent in:-

a. Driving too fast in the circumstances.

b. Failing to brake swerve or in any other way [to act] so as to control motor vehicle KAC 809A so as to avoid the collision.

c. Failing to avoid the collision.

d. Failing to have any or any adequate regard for other road users.

7. The appellants also denied that any demand notice of intention to sue had been given to them by the respondent nor that they had refused/neglected to compensate the respondent.

8. The respondent filed a reply to the amended defence in which he denied the contents of the defence which he termed a sham and a mere denial. He also joined issue with the appellants' defence save in so far as the same consisted of admissions.

The Respondent's Case

9. After the notice to the appellants and having failed to appear, the suit proceeded ex-parte. The respondent James Ndotono Ng'ang'a testified as PW1 and testified how as he was trying to overtake a truck it collided with his (respondents) motor vehicle. On collision which was head on, the respondent got a black out, but by the time he was being taken to Lari hospital he was almost conscious. He was admitted for one day but thereafter sought further treatment at Kijabe mission hospital. The respondent stated further that the accident was reported to Lari police station where he was issued with a pre-accident report – Pexhibit 1. Treatment notes from Lari hospital were produced as Pexhibit 2. The report by Dr. Moses Kinuthia dated 29th September, 2011 was produced as Pexhibit 3 while the receipt for Kshs 3,000/= paid to Dr. Kinuthia was produced as Pexhibit 4. Receipts for assessment by Orient assessors and valuers totaling Kshs 257,800/= were produced in a bundle as Pexhibit 5. The court ruling in which the 2nd appellant was convicted on his own plea of guilty to a traffic offence was produced as Pexhibit 8. The search document which cost the respondent Kshs 500/= together with the receipt were produced as Pexhibit 9a and 9 b respectively.

10. During cross examination the respondent stated that the accident occurred on a curve in the road and that at the material time both himself and driver of the offending vehicle were trying to overtake other vehicles on the road, hence the head-on collision. The respondent also testified that after the accident his motor vehicle was written-off. Regarding the injuries, he sustained during the accident the respondent testified that he was injured on the forehead and on the neck. He denied that he was the one in the wrong and blamed the driver of the appellants for the accident.

11. PW2 was John Njoroge Kinuthia, a church elder who doubled up as a motor vehicle assessor and worked at Orient. He testified that he assessed the respondent's motor vehicle registration number KAC 809A and valued it at Kshs 360,000/= with a salvage value of Kshs 160,000/=. He also testified that if repairs had been done, the same would have cost Kshs 243,600/= inclusive of VAT. The assessment report and the payment receipt were produced as Pexhibit 6 and Pexhibit 7 respectively.

12. During cross examination, PW2 stated that his instructions were limited to assessing the damage and possible cost of repairs, though many items receipted for from a number of suppliers did not appear in the assessment report.

The Appellants' Case

13. The appellants did not call any witnesses. Both parties thereafter filed and exchanged their respective written submissions for consideration by the trial court.

Issues for Determination

14. The learned Trial Magistrate framed the following issues for determination: -

a. ***Was ownership of the motor vehicles proved?***

b. ***Did the accident occur on the material day involving the said motor vehicles?***

c. ***If the answer to (b)is yes, who is liable for it?***

d. ***Is the Plaintiff (now respondent) entitled to damages?***

15. From the grounds of appeal, the first three issues above stated are not contentious. The only contention is the award of damages by the learned Trial Court.

Submissions in this Appeal

16. Both parties filed and exchanged their rival submissions on 20th September, 2019 and 28th August, 2019 respectively. The appellants argued all the three grounds of appeal together and submitted that the evidence on record and especially the evidence of PW2 did not support the respondent's claims and therefore that the trial court had no basis for making the awards to the respondent. Counsel argued that from the receipts produced in court, only a sum of Kshs 138,000/= relates to items attributable to accidental damage and that that is the amount that the trial court ought to have awarded. The appellants submitted that there were excess amounts expended on front bumper – Kshs 18,000/= - on the battery – Kshs 2,300/= - and on labour – Kshs 1,500/= bringing the total excess mount to Kshs 21,800/= which amount should be deducted from the sum of Kshs 159,800/= which amount relates to the damaged parts.

17. Counsel also submitted that though the trial court cited the correct principle of law as enunciated in **Halin -vs- Singh [1985] KLR 716** it failed to interrogate the receipts to confirm that the same tallied with the sum claimed. Counsel called upon this court to do the interrogation and to award the sum of Kshs 138,000/= and grant costs to the appellants.

18. In his submissions, the respondent argued that there is no basis for this court to take the course proposed by the appellants with regard to the award made to the respondent. In this regard, the respondent placed reliance on ***Nkuene Dairy Farmers Co-op Society Ltd & another -vs- Ngacha Ndeiya [2010] eKLR.*** The issue in the case above was whether the assessors report which had not been challenged in any way whatsoever was sufficient proof of the extent of the material damage to the respondent's vehicle. The Court of Appeal concluded that " ***The assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim."***

Analysis and Determination

19. There is no doubt in the instant case that the respondent's damaged motor vehicle was taken for damage assessment to Orient Motors and same was duly done. What is to be remembered however, is that a material damage claim is a special damage which must not only be claimed specially but must also be strictly proved for such damages "***are not the direct material or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves***" see **Halin -vs- Singh** (above at page 3 of the judgment).

20. According to the record, PW2 who assessed the respondent's vehicle stated in his evidence that he marked the damaged parts as items 1 to 22 in his assessment report. PW2 also stated as he looked at the report *vis a vis* the receipts that the parts that required replacement in the assessment report did not tally with items purportedly bought for the repair and were in fact not in the assessment report. It was also PW2's testimony that he did not assess the vehicle after repairs were carried out to confirm whether the repairs were done in accordance with the assessment report.

21. Having reconsidered and evaluated PW2's evidence this court finds that the Assessors Report was disputed in very material particulars. PW2 himself confirmed that there were discrepancies between the items bought and the items listed in the Assessor's Report as requiring replacement. This being the case this court agrees with the appellants that the award made by the learned Trial Court was not fully supported by the documentary proof. Accordingly this court would allow the appeal on the cost of repair charges by setting aside the sum of Kshs 243,600/= and substituting the same with Kshs 138,000/=.

Conclusion

22. In summary this court enters judgment for the respondent as follows:-

a. ***Repair damages - Kshs 138,000/=***

b. ***Assessment fees - Kshs 4,000/=***

c. ***Police abstract - Kshs 100/=***

d. ***Towing charges - Kshs 10,000/=***

e. Towing charges - Kshs 6,500/=

Total - Kshs 240,400/=

23. As for costs, each party shall bear its own costs for this appeal.

24. Orders accordingly.

Judgement written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned electronically at Kiambu on this **21st** day of **May,2020**

……..

CHRISTINE W.MEOLI

JUDGE